INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusions	11

CITATIONS

Cases:

Draper v. *United States*, 358 U.S. 307	7
Harris v. *United States*, 390 U.S. 234	7
Lawn v. *United States*, 355 U.S. 339	6
Leary v. *United States*, 395 U.S. 6	9, 10, 11
McCray v. *Illinois*, 386 U.S. 300	7, 8
Minor v. *United States*, No. 189, 1969 Term, certiorari granted, June 2, 1969	10
Miranda v. *Arizona*, 384 U.S. 436	5
Roviaro v. *United States*, 353 U.S. 53	8
Rugendorf v. *United States*, 376 U.S. 528	8
Smith v. *United States*, 358 F. 2d 833, certiorari denied, 386 U.S. 1008	7
Spinelli v. *United States*, 393 U.S. 410	7
Turner v. *United States*, No. 190, 1969 Term, certiorari granted, June 2, 1969	8, 9
United States v. *Covington*, 395 U.S. 57	11
United States v. *Ventresca*, 380 U.S. 102	7, 8, 9

Statutes and rule:

	Page
21 U.S.C. 173	4
21 U.S.C. 174	4, 10
26 U.S.C. 4705(a)	11
Rule 30, F. R. Crim. P.	9

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 358

JAMES RILEY JR. AND FRANK MARSHALL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969. A petition for rehearing was denied on June 20, 1969. On July 19, 1969, the peti-

tion for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' arrest was based on probable cause, and whether, after the arrest, it was reasonable to seize the contraband heroin from the government vehicle where it had been left by petitioner Marshall.

2. Whether the trial court erred in refusing to require disclosure of the identity of the informant at the hearing on the motion to suppress.

3. Whether reversible error resulted from the trial court's instruction regarding the inference of knowing and unlawful importation flowing from petitioners' possession of the heroin.

4. Whether petitioners' convictions were in violation of their Fifth Amendment privilege against self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted on two counts of an indictment which charged a conspiracy to receive and conceal illegally imported heroin and the substantive offense of receipt, concealment and transportation of approximately five ounces of heroin, after importation from Mexico into the United States, in violation of 21

U.S.C. 173, 174 (1 R. 4-5).[1] On September 25, 1967, each petitioner was given concurrent sentences of ten years' imprisonment on each count.

During May 1967 in the border town of Nogales, Arizona, petitioner Riley was seen in the company of a known narcotics trafficker, one Campbell (2 R. 16-18, 37). A few days later, a "reliable" (2 R. 37, 55) informant who had provided consistently accurate information on narcotics importation in the past (see Pet. App. 10) advised American customs officials that Negro associates of Campbell were negotiating in Nogales, Mexico, with one Martinez to purchase heroin (2 R. 36-37). Later, the informant advised customs that these associates had made a purchase and returned to the United States, but that they would return for another purchase from Martinez about June 5, 1967 (2 R. 21-22, 29-30, 38, 72).

On June 4, 1967, petitioners (both Negroes) appeared in the company of a lady companion at Nogales, Arizona (3 R. 30). On June 5, they made numerous telephone calls, received money by Western Union, and approached the border area (3 R. 20, 32-33, 40). Thereafter, the three suddenly headed north in a rented car at speeds up to 105 miles per hour (2 R. 76, 3 R. 20). Customs officials stopped and searched them. They found no narcotics but found approximately $5,000 in petitioner Riley's possession

---

[1] "R." refers to the four-volume record on file with the Clerk of this Court. Volume 1 is the court of appeals record, and contains the trial court's ruling on the motion to suppress (1 R. 44-54). Volume 2 contains the transcript of the pretrial hearing on the motion to suppress. Volumes 3 and 4 contain the trial transcript, consecutively paginated.

(3 R. 21, 183; 4 R. 247). The three were then released (3 R. 141).

On June 6, Miss Stanley, the lady companion, boarded a bus at Nogales, and the two petitioners, late that evening, after numerous telephone calls, crossed into Mexico on foot (3 R. 144; 4 R. 196-198). On June 7, the informant advised customs that two Negro males were in Nogales, Mexico, waiting for Martinez to return with some narcotics (2 R. 81). The waiting Negroes were described by the informant and from the descriptions the customs agents "easily recognized" that petitioners were the persons waiting for Martinez (Pet. App. 3; 2 R. 70, 81, 101). Later the same day the informant advised that Martinez had returned and that the two men had made a purchase in Mexico from Martinez, paying him the equivalent of approximately $4,000 (2 R. 39, 60, 67, 81-82). Thereafter, petitioners separately returned to the border station and were permitted to pass without being searched (4 R. 202-203, 207).

Subsequently on that same day, petitioners were seen riding in a taxi heading towards Tucson, Arizona. Customs agents Dennis and Anderson, and Arizona police officer Dunn, converged on the taxi as it pulled into the Tucson bus station and arrested petitioners (3 R. 122-124, 147). Since a crowd started to gather, petitioners were only given a quick frisk for weapons before being placed in Sergeant Dunn's vehicle for transportation to a state government building for a further search (3 R. 148; 4 R. 210). Before petitioners entered the government vehicle, Dunn observed that there was nothing on the

rear seat, other than some of his clothing which he placed between the two petitioners (4 R. 224). Dunn, sitting in the front, observed petitioners after they entered the rear of the vehicle. He saw petitioner Marshall place his right hand under the front portion of his shirt and move his hand towards the right rear of his person, an act consistent with a surreptitious removal of a package (4 R. 224). Agent Dennis then entered the front of the vehicle and told both petitioners to put their hands on their knees (4 R. 165, 225). Upon arrival at their destination, and as petitioners were in the process of alighting, Dunn noticed and called Agent Dennis' attention to the fact that "something had been left on the seat" of his car at the spot where petitioner Marshall had been sitting (4 R. 224, 226). This item, a plastic bag, was not retrieved immediately, as Dunn assisted in guarding petitioners while they were moved inside the building. From inside, Dunn watched his vehicle to make sure it remained undisturbed, and, upon the arrival of another police officer, he returned to the vehicle and removed the plastic bag which he gave to customs agent Washington (4 R. 227, 249). Agent Washington saw police officer Dunn go to the car and take out a bag which contained 5½ ounces of brown powder (4 R. 252-254). Later examination revealed this brown powder contained 60 percent pure heroin (4 R. 268-269).

Petitioners were then formally placed under arrest by the federal authorities for smuggling narcotics and were advised of their rights of silence and counsel as specified in *Miranda* v. *Arizona*, 384 U.S.

436 (3 R. 150-151). After petitioner Riley stated that he understood the warnings and despite the fact that he was then told by an officer to say nothing, Riley asked: "Did those Mexicans at Nogales turn me in?" (4 R. 280, 286-287). At that time the agent who received the inquiry had no intention of questioning Riley (2 R. 84; 4 R. 284).

ARGUMENT

1. As the courts below correctly held, petitioners' arrests were supported by ample probable cause. The informant, who had provided reliable information in approximately twenty prior cases, could fairly be believed as to the dealings of petitioners with the Mexican supplier, Martinez. Moreover, his information was corroborated by petitioners' own activities—*i.e.*, by their apparance in Nogales, Arizona, on about the day when the informant said the second sale was scheduled to take place and by their subsequent movement into Mexico with a large sum of money.[2] Peti-

[2] Petitioners raise as a question presented (Pet. 2), but do not argue, the point that when they were stopped on June 5, found to possess $5,000 and then released, they were then the victims of illegal action by the customs agents. This issue was not originally presented to the court of appeals (see Pet. App. 4, n. 1) and no "exceptional circumstances" are presented justifying review by this Court at this stage. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the district court held a hearing on the issue and found that the search of petitioner Riley's person on that date and the discovery of the $5,000 was incident to a lawful arrest. This finding was proper since by that time petitioners were conducting themselves in a manner corroborative of the informant's prior information that they were going to return to Mexico and engage in a narcotics transaction with Martinez.

tioners' suspicious activities witnessed thereafter by customs agents further bolstered the conclusion that they were involved in the purchase of heroin in Mexico and its illegal importation into this country. See *Draper* v. *United States*, 358 U.S. 307; *McCray* v. *Illinois*, 386 U.S. 300. Cf. *Spinelli* v. *United States*, 393 U.S. 410.

That petitioners were not arrested by the agent (Agent Cavitt) with the primary knowledge of what the informant had said as to the illegal narcotics transaction (2 R. 21-23, 37) is irrelevant since "probable cause is to be evaluated by the courts on the basis of the collective information of the police rather than that of only the officer who performs the act of arresting." *Smith* v. *United States*, 358 F. 2d 833, 835 (C.A.D.C.), certiorari denied, 386 U.S. 1008; see *United States* v. *Ventresca*, 380 U.S. 102, 111. The arrests being lawful, police could seize, without a search, property in plain view which the evidence indicates petitioners had left in the police officer's vehicle on their way to the state government building. In these circumstances, there was no "search" within the meaning of the Fourth Amendment, much less an invalid one. *Harris* v. *United States*, 390 U.S. 234; and see our brief in opposition in *Bourassa* v. *United States*, No. 530 Misc., 1969 Term.

2. No error resulted from the refusal of the trial court to require disclosure of the identity of the informant, an issue raised by petitioners at the pretrial stage of the case (see Pet. 14-15). Evidence was received as to the past reliability of the informant, and the trustworthiness of his reports pertain-

ing to petitioners was confirmed by the customs agents' own observations of the comings, goings, and overall activities of petitioners in the border area. Under these circumstances, the trial court properly declined to require disclosure of the informant's name at the hearing to determine probable cause for an arrest. *McCray* v. *Illinois*, 386 U.S. 300; *United States* v. *Ventresca*, 380 U.S. 102, 112; *Rugendorf* v. *United States*, 376 U.S. 528. In this regard, petitioners' reliance on *Roviaro* v. *United States*, 353 U.S. 53, is misplaced. There the prosecution's evidence on the merits indicated the informant was an active participant in the offense charged and that his identity was essential in order to prepare a defense at trial. This was of course not so in the instant case, as the court of appeals pointed out (Pet. App. 8, 10).

3. For the first time at any stage of the proceedings (see Pet. 10), petitioners contend that the trial judge committed reversible error in charging the jury with respect to the provision in 21 U.S.C. 174 which permits an inference of unlawful importation and knowledge thereof from evidence showing possession of narcotics.[3] While the validity of that presumption is presently before this Court in *Turner* v. *United States*, No. 190, 1969 Term, certiorari granted, June 2, 1969, we do not believe that there is per-

---

[3] Proof of the fact of possession stemmed from petitioner Marshall's surreptitious actions in leaving a quantity of heroin in the police car while he and Riley were being transported to the state government building (see *supra*, p. 5).

suasive reason to defer consideration of this issue in the instant case until *Turner* has been decided.

The thrust of the government's evidence here was that petitioners had themselves purchased the heroin in Mexico and thereafter clandestinely introduced it into the United States. While the indictment did not charge them with actual smuggling, the evidence was certainly sufficient for the jury to conclude, wholly apart from any inference resulting from possession, that petitioners were well aware of the source of the heroin which they were transporting. In such circumstances, had petitioners raised an objection to the giving of the instruction—particularly if made on constitutional grounds—the government may well have agreed that the instruction could be dispensed with. The prosecution would have at least been alerted to a possible constitutional defense and, in the face of the strong direct evidence of petitioners' knowledge of the illegal importation, may well have decided to acquiesce in the defense objection to the charging of the presumption. In a case such as this, where knowledge of illegal importation was plain from the proven facts, petitioners should not be heard to interject a constitutional issue which a timely objection at trial might have avoided.[4] See Rule 30. F. R. Crim. P.

---

[4] While it is true that in *Leary* v. *United States*, 395 U.S. 6, 32, the defendant did not object to an instruction relating to the similar presumption regarding marijuana, he had previously raised the issue, on constitutional grounds, in an earlier motion for a directed verdict at the close of the government's case and did so again in his subsequent motion for a new trial.

4. Petitioners also for the first time raise the claim that their convictions must fall on self-incrimination grounds under the rationale of *Leary* v. *United States*, 395 U.S. 6. They claim that the only way they could have legally possessed heroin under 21 U.S.C. 174 was by registering their possession under the taxing provisions of the Harrison Narcotics Act, but that to do so would have incriminated them under those provisions. The short answer is that petitioners were charged with illegal "transportation" and "concealment" under 21 U.S.C. 174, and not with smuggling narcotics in violation of that section. Their criminal responsibility thus did not turn upon any alleged requirement that they declare or invoice the heroin; their liability turned on the fact that they dealt with it illegally knowing of its illegal importation. Compliance with the statute thus required that they refrain from illegal transportation and concealment, not that they make any disclosure at all. Compare our brief in opposition in *Trujillo* v. *United States*, No. 96, 1969 Term.

There is further reason not to defer consideration of this aspect of the instant case pending this Court's decision in *Minor* v. *United States*, No. 189, 1969 Term, certiorari granted, June 2, 1969. That case involves the effect of asserting the privilege against self-incrimination of a seller of narcotics without an order form in violation of a provision of

the Harrison Narcotics Act (26 U.S.C. 4705(a)), and not, as here, an untimely claim of privilege regarding the unrelated importation statute, compliance with which would not have subjected petitioners to any "substantial risk of self-incrimination." *United States* v. *Covington*, 395 U.S. 57, 59; *Leary* v. *United States*, 395 U.S. 6, 13.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

AUGUST 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 360393 108